

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BRIAD WENCO, LLC**

**and**

**Case No. 29-CA-165942**

**FAST FOOD WORKERS COMMITTEE**

**REPLY BRIEF OF RESPONDENT BRIAD WENCO, LLC IN SUPPORT  
OF ITS EXCEPTIONS TO THE ADMINISTRATIVE  
LAW JUDGE'S DECISION AND ORDER**

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Pursuant to 29 C.F.R. Section 102.46(h), Respondent Briad Wenco, LLC (“Respondent” or “Briad”) submits this Reply Brief in Support of its Exceptions to the Decision and Order (the “Decision”) of Administrative Law Judge (“ALJ”) Joel P. Biblowitz, dated July 6, 2016, and in response to the Answering Brief filed by the Charging Party Fast Food Workers Committee (the “FFWC”).<sup>1</sup> As shown below and in Briad’s Exceptions and Brief in Support, the Decision is unsupported by the law and should be overruled and rejected by the Board.

**I. THE ARBITRATION AGREEMENT IS ENFORCEABLE UNDER BINDING SUPREME COURT PRECEDENT**

Contrary to the Decision and the FFWC’s arguments in support thereof, binding U.S. Supreme Court precedent requires that the Arbitration Agreement be upheld for all the reasons set forth in Briad’s Brief in Support of its Exceptions (which, for the sake of economy, are not repeat herein).

In support of the Decision, the FFWC, in its Answering Brief, nakedly relies on the Board’s decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) and its progeny, and cherry-picks the Seventh Circuit’s May 2016 decision in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1159-60 (7th Cir. 2016), for the proposition that the right to bring a class or collective action is a substantive (as opposed to procedural) right under the Act, and therefore any agreements which restrict this right violate the Act. On the other hand, the FFWC conveniently ignores the plethora of federal circuit and district court decisions rejecting *D.R. Horton* and its progeny which Briad cited in its Brief in Support of its Exceptions. For example, the Second Circuit – which is likely

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<sup>1</sup> The Counsel for the General Counsel’s (the “CGC”) Answering Brief is nothing more than a short informal letter asking the Board to affirm the ALJ’s Decision “[f]or the reasons articulated” therein. As such, and in order to conserve the parties’ and the Board’s resources, Briad elects not to file a separate Reply Brief in response to the CGC’s Answering Brief; rather, Briad respectfully refers the Board to its Brief in Support of Its Exceptions and the instant Reply Brief as to why the Board should overrule and reject the Decision and dismiss the Complaint in its entirety with prejudice.

the court that would hear the appeal from any enforcement order in this action – has explicitly declined to follow the Board’s conclusion in *D.R. Horton* that class-action waivers violate the NLRA. See *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) 726 F.3d at 297-98, n.8 (“[W]e decline to follow the decision in *D.R. Horton*. Even assuming that *D.R. Horton* addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning.”) (internal quotations and citation omitted); see also *Morris v. Ernst & Young*, No. 13-16599, 2016 U.S. App. LEXIS 15638, at \*53 (9th Cir. Cal. Aug. 22, 2016) (“The Second, Fifth, and Eighth Circuits have concluded that the NLRA does not invalidate collective action waivers in arbitration agreements.”) (dissent) (emphasis added); *Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71, 80 (S.D.N.Y. 2015) (“Drawing upon the Second Circuit’s analysis, this Court finds that the NLRA does not stand in the way of the FAA’s command to enforce arbitration agreements ‘according to their terms.’”)(citation omitted).

Most recently, on August 9, 2016, the United States District Court for the District of Massachusetts upheld the validity of an employer’s class action waiver, rejecting arguments that the waiver ran afoul of the Act. See *Bekele v. Lyft, Inc.*, No. 15-11650-FDS, 2016 U.S. Dist. LEXIS 104921 (D. Mass. Aug. 9, 2016). Significantly, in its decision, the *Lyft* Court thoroughly analyzed and then pointedly criticized the Seventh Circuit’s decision in *Lewis* for its “critical misstep” in logic in concluding that “an employee’s ability to bring a collective action against his employer is ‘other concerted activit[y]’ protected by Section 7.” *Id.* at \*55 (citing *Lewis*, 823 F.3d at 1152).

More specifically, the *Lyft* Court demonstrated how the *Lewis* Court erroneously supplied its own definition of “concerted activities,” relying in large part on a dictionary definition, whereas the *proper* “starting point, and normally the ending point, for construing a statute is the

words of the statute itself.” *Id.* at \*55-56. As noted by the Supreme Court, “[w]hether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words. Rather ‘the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole.’” *Id.* at \*56 (citing *Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015)).

With respect to Section 7 of the Act, the actual text states: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage *in other concerted activities* for the purpose of collective bargaining or other mutual aid or protection.” *Id.* at \*57 (citing 29 U.S.C. § 157). The *Lyft* Court explained that the context in which the words “in other concerted activities” appear serve to clarify their meaning. “[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words,” under the long-established canon of statutory construction known as *ejusdem generis*. *Id.* at \*57-58 (internal quotations and citations omitted).

Therefore, with respect to Section 7 of the Act, “the specific terms that give ‘other concerted activities’ meaning are the ‘right to self-organization,’ the right to ‘form, join, or assist labor organizations,’ and the right ‘to bargain collectively through representatives of their own choosing.’” *Id.* at \*59 (citing 29 U.S.C. § 157). Under these circumstances, the term “other concerted activities” must be interpreted to mean other concerted activities “of a similar type as the three enumerated activities.” *Id.* (emphasis added). “That would include, for example, such collective employee actions as picketing or organizing boycotts,” the court held, but “[i]t would

not, however, include an employee's ability to bring a class-action lawsuit under Fed. R. Civ. P. 23, which is of a different class or character than the enumerated rights. Rule 23 provides a procedural vehicle for all persons to use to assert certain types of claims, not a substantive right of employees to act collectively in the labor marketplace." *Id.* at \*59-60.

In sum, the *Lyft* Court concluded, the *Lewis* Court and the Board have erred by invalidating class action waivers as "it is clear from the text of the NLRA that an employee's ability to bring a class action against his employer under Rule 23 is not a substantive right protected by the statute. Rather—just as it is for every other type of plaintiff—it is a procedural vehicle by which an employee may seek to enforce a substantive right." *Id.* at \*61. *See also* *Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ [a class action under Rule 23] is a procedural right only, ancillary to the litigation of substantive claims." ).<sup>2</sup>

As class action waivers do not implicate any *substantive* rights protected by the Act, Briad respectfully requests that the Board reconsider its holding in *D.R. Horton* and its progeny and find the Arbitration Agreement to be enforceable.

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<sup>2</sup> On August 22, 2016, the Ninth Circuit aligned itself with the Seventh Circuit in finding the right to bring a class or collective action to not merely be procedural in nature. *See Morris*, 2016 U.S. App. LEXIS 15638. The Ninth Circuit, in so holding, committed the same "critical misstep" in logic as the *Lyft* Court criticized the Seventh Circuit for committing in *Lewis*. Moreover, as previously noted, the Ninth Circuit itself recognized that its decision in *Morris* was at odds with the Second Circuit's jurisprudence on this issue. *See id.* at \*31 n.16, 53 ("The *Second*, Fifth, and Eight Circuits have concluded that the NLRA does not invalidate collective action waivers in arbitration agreements.") (dissent) (emphasis added). The Second Circuit is likely the court that would hear the appeal from any enforcement order in this action and the Board should defer to it in adjudicating this matter.

## **II. THE ARBITRATION AGREEMENT DOES NOT RESTRICT EMPLOYEE ACCESS TO THE BOARD**

The FFWC argues that the ALJ correctly found the Arbitration Agreement to be unlawful on the grounds that employees would reasonably believe that it restricts their rights to file charges or participate in the Board's processes. However, this finding of the ALJ should be overturned as it is contrary to Board precedent and conflicts with the plain reading of the Arbitration Agreement itself.

Board law requires that in "determining whether a challenged rule is unlawful, the Board must...give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Martin Luther Mem'l Home, Inc.*, 343 NLRB 646, 646 (2004).

Here, the Arbitration Agreement cannot reasonably be construed by employees to restrict them from filing charges with the Board or accessing its processes because paragraph 11 of the Arbitration Agreement explicitly states that "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including but not limited to, ....**the National Labor Relations Board**.... in connection with any claim such employee may have against the company." (Emphasis added.) Any purported ambiguity can only be found via improper parsing of the language in the Arbitration Agreement, viewing phrases in isolation and presuming improper interference. Given a reasonable reading, the Arbitration Agreement cannot as a matter of law be read to interfere with employees' access to the Board, and the ALJ erred in concluding otherwise. *See Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1020 (5th Cir. 2015) (holding that "it would be unreasonable for an employee to construe the [arbitration agreement] as prohibiting the filing of Board charges when the agreement says the opposite.").



## **CONCLUSION**

For all the foregoing reasons and for all the reasons set forth in Briad's Exceptions to the Decision and Brief in Support of its Exceptions, Briad respectfully requests that the Board overrule and reject the Decision, find that Briad did not violate Section 8(a)(1) of the Act, and dismiss the Complaint in its entirety with prejudice.

Dated: New York, NY

August 31, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of August, 2016, a true and correct copy of the forgoing was filed with the Board via the Board's electronic filing system, and served by electronic mail upon the following:

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